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Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 37

CIVIL

GENE DURFEE AND LAURA DURFEE,
Petitioners,

vs.

JULIA E. DUKE,
Respondent.

AMICUS CURIAE BRIEF OF THE STATE OF NEBRASKA

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INDEX

	Pages
Interest of Amicus Curiae	1
Argument:	
Introduction	2
Res Judicata	3
Full Faith and Credit	9
Conclusion	15
Proof of Service	17

CASES CITED

American Surety Co. v. Baldwin, 287 U.S. 156, 77 L. ed. 231, 53 S. Ct. 98 (1932) — 12

Ashton v. Cameron County Water Improv. Dist., 298 U.S. 513, 80 L. ed. 1309, 56 S. Ct. 892 (1936) — 7

Baldwin v. Iowa State Traveling Men's Ass'n., 283 U.S. 522, 75 L. ed. 1244, 51 S. Ct. 517 (1931) — 5, 6, 9, 13

Chicago Life Ins. Co. v. Cherry, 244 U.S. 25, 61 L. ed. 966, 37 S. Ct. 492 (1917) — 9, 14

Chicot Co. Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 84 L. ed. 329, 60 S. Ct. 317 (1940) — 7, 8, 9

Christmas v. Russell, 72 U.S. (5 Wall.) 290, 18 L. ed. 475 (1866) — 10

Durfee v. Keiffer, 168 Neb. 272, 95 N. W. 2d 618 (1959) — 2, 9, 14

Forsyth v. Hammond, 166 U.S. 506, 41 L. ed. 1095, 17 S. Ct. 665 (1897) — 4, 5

Gergen v. Western Union Life Ins. Co., 149 Neb. 203, 30 N. W. 2d 558 (1948) — 11

Jackson v. Irving Trust Co., 311 U.S. 494, 85 L. ed. 297, 61 S. Ct. 326 (1941) — 8

CASES CITED—Continued

Pages

Mills v. Duryee, 11 U. S. (7 Cranch) 481, 3 L. ed. 411 (1813) 10

Riley v. New York Trust Co., 315 U. S. 343, 86 L. ed. 885, 62 S. Ct. 608 (1942) 2

Sherrer v. Sherrer, 334 U. S. 343, 92 L. ed. 1429, 68 S. Ct. 1087 (1948) 15

Stoll v. Gottlieb, 305 U. S. 165, 83 L. ed. 104, 59 S. Ct. 134 (1938) 6, 7, 8, 9

Thompson v. Whitman, 85 U. S. (18 Wall.) 457, 21 L. ed. 897 (1874) 10, 11

Williams v. North Carolina, 325 U. S. 226, 89 L. ed. 1577, 65 S. Ct. 1092 (1945) 14

Zenker v. Zenker, 161 Neb. 200, 72 N. W. 2d 809 (1955) 10

STATUTE CITED

62 Stat. 947, 28 U. S. C. A., Section 1738 (1948) 3, 9

CONSTITUTION CITED

Art. IV, Sec. 1 of the United States Constitution 3, 9, 15

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GENE DURFEE AND LAURA DURFEE,
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vs.

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Respondent.

AMICUS CURIAE BRIEF OF THE STATE OF NEBRASKA

INTEREST OF AMICUS CURIAE

The State of Nebraska through its Attorney General presents this Brief Amicus Curiae. While Nebraska is not concerned with the question of whether the petitioners or the respondent own the land involved in this controversy, she is very much interested in the question of whether the judgments of her courts are to be accorded full faith and credit in the courts of other states. It is for that reason alone that this brief is written.

The state's position is that the judgment of the Nebraska Supreme Court in *Durfee v. Keifer*, 168 Neb. 272, 95 N. W. 2d 618 (1959), is res judicata in the state and federal courts in Nebraska and that such judgment should be given full faith and credit herein.

ARGUMENT

Introduction

When considering the conclusive effect of a judgment of one state in the courts of a sister state, the common-law concept of res judicata and the Constitutional requirement that the judgments of a sister state shall be entitled to full faith and credit are, by their very nature, intertwined and incapable of any distinct separation. Res judicata, of course, is a common law concept favoring the finality of judgments and opposing re-litigation of the same issue between identical parties. On the other hand the requirement that each state shall accord full faith and credit to the judicial decisions of its sister states is based upon the Constitutional mandate of Article IV, Section 1 of the United States Constitution. This Court has recognized the dual relationship between res judicata and the full faith and credit clause, for it was in *Riley v. New York Trust Co.*, 315 U. S. 343, 86 L. ed. 885, 62 S. Ct. 608 (1942) that Mr. Justice Reed stated:

> "By the constitutional provision for full faith and credit, the local doctrines of res judicata, speaking generally, become a part of the national jurisprudence, and therefore federal questions cognizable here." 315 U. S. at 349, 86 L. ed. at 891.

The source of this dual relationship becomes manifest when one considers the implementing legislation to Article IV, Section 1, the full faith and credit clause. With this legislation Congress has provided, inter alia,

> "Such Acts, records and judicial proceedings or copies thereof so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." 62 Stat. 957, 28 U. S. C. A., Section 1738 (1948).

It thus becomes apparent that any attempt to separate completely for individual and isolated analysis the issues of res judicata and full faith and credit, as they appear before this Court for consideration, would be unavailing. Yet, for the sake of convenience, clarity of thought and orderly analysis, the following argument will first consider the doctrine of res judicata as it applies to subject matter jurisdiction, then the full faith and credit problems raised by the opinion of the Court of Appeals.

Res Judicata

The petitioners herein commenced a quiet title action in the District Court for Richardson County, Nebraska, naming as defendants the present respondent and her tenants. The substantive question involved, as well as the question of the Nebraska district court's subject matter jurisdiction, revolved upon a determination of whether a shift in the channel of the Missouri River was caused by accretion or avulsion. The district Court found the shift to have been caused by avulsion, and thus determined that the court had jurisdiction and quieted title in

the petitioners. Respondent prosecuted an appeal to the Nebraska Supreme Court, and after a trial de novo that court also found for petitioners, in specific that the land was in Nebraska and the Nebraska courts had subject matter jurisdiction.

Respondent immediately commenced this second title action in the Circuit Court of Holt County, Missouri. Upon removal to the United States District Court that court concluded that the Nebraska decision was binding upon it and the petition was dismissed. The respondent then took her case to the Court of Appeals for the Eighth Circuit, whereupon that tribunal determined the concept of res judicata and the full faith and credit clause of the United States Constitution to be inapplicable. It is to review this decision that the present petition for certiorari was applied for and granted.

The question presented is whether the Nebraska Court's determination of its own jurisdiction over the subject matter, a determination made both as to fact and law after a complete hearing involving all parties, precludes a subsequent inquiry into this question by the Missouri Courts. To frame the question in a more informal manner, may the Nebraska Court lift itself by its own bootstraps and determine its own jurisdiction.

Over half a century ago the oft-quoted and much discussed case of *Forsyth v. Hammond*, 166 U. S. 506, 41 L. ed. 1095, 17 S. Ct. 665 (1897) presented to this Court a situation closely analogous to that at hand. The case originated as an Indiana State Court determination that a certain parcel of land was validly annexed by the City of Hammond. The plaintiff, owner of part of the land

and a party to the original proceeding, filed a bill in equity in federal court to restrain collection of taxes by the city on the land. An injunction was denied, but this was reversed by the Court of Appeals. Prior to the federal action, however, the plaintiff had appealed from the original state court determination to the Indiana Supreme Court. That Court had affirmed the lower state court finding of subject matter jurisdiction and dismissed the appeal.

On certiorari this Court pointed out that the plaintiff in *Forsyth*, before commencing the federal court proceeding, had voluntarily sought the judgment of the Indiana Supreme Court. The question of jurisdiction having been litigated all the way through the state courts was held to be res judicata in the federal equity proceeding.

Forsyth is analytically identical to the instant case. In both, the question of subject matter jurisdiction was fully litigated in the lower state court. In both, the losing party voluntarily sought review to the state's high court. In both, this voluntary submission of the issue to the state supreme court resulted in an unfavorable determination. As this court in *Forsyth* held the subsequent action to inquire into the jurisdiction of the Indiana State Court to be barred by res judicata, it should now determine this respondent's subsequent attempt to re-litigate the jurisdictional question likewise to be barred.

Another striking example of this Court's adherence to the principles of res judicata as applied to jurisdictional matters is found in *Baldwin v. Iowa State Traveling Men's Ass'n.*, 283 U. S. 522, 75 L. ed. 1244, 51 S. Ct. 517

(1931) which involved jurisdiction of the person. For the first time the Court was called upon to determine whether a prior determination of personal jurisdiction in the federal court of one state, after a hearing in which both parties were present, could be attacked collaterally in an action to enforce the original judgment in the federal court sitting in a second state. In answering this inquiry in the negative the Court stated:

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matter once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in *every case where one voluntarily appears, presents his case and is fully heard*, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause." 282 U. S. 522, 525-6, 75 L. ed. 1244, 1247. (Emphasis added.)

It was but seven years later that this Court announced that the rule in *Baldwin* was applicable not only to personal jurisdiction but also to subject matter jurisdiction. This logical extension of the *Baldwin* case came in *Stoll v. Gottlieb*, 305 U. S. 165, 83 L. ed. 104, 59 S. Ct. 134 (1938).

In *Stoll* this Court held that where the question of jurisdiction of a bankruptcy court was fully litigated in that court, its determination was res judicata in a subsequent action. Mr. Justice Reed, speaking for the Court, pointed out that no opinion was being expressed as to whether the bankruptcy court did or did not have subject-matter jurisdiction, yet, inferentially the opinion seems to proceed on the assumption the bankruptcy court er-

roneously determined that it had subject matter jurisdiction.

Two years after this Court's decision in *Stoll v. Gottlieb*, supra, the question of the res judicata effect of a prior determination on the merits where the question of jurisdiction, though not raised, could have been presented, was reviewed by the Supreme Court. *Chicot Co. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 84 L. ed. 329, 60 S. Ct. 317 (1940), held that the failure to raise the jurisdictional questions in the first instance was fatal to a subsequent collateral attempt to question the court's competency over the subject matter.

In the *Chicot* case the respondent commenced an action in the federal district court in Arkansas to recover on certain bonds issued by the Drainage District. This District had been organized under the statutes of Arkansas and the bonds were in default. The petitioner pleaded as a bar to the substantive question involved a prior decree of this same district court in an action which had been instituted by the petitioner to effect a plan of readjustment of indebtedness. The district court denied the res judicata effect of the prior determination. The basis of its decision was the invalidity of the decree due to this Court's determination in *Ashton v. Cameron County Water Improv. Dist.*, 298 U.S. 513, 80 L. ed. 1309, 56 S. Ct. 892 (1936), that the statute under which the federal district court had acted was unconstitutional. The *Ashton* case was decided subsequent to the entry of the original district court decree in *Chicot*.

The general and well-settled principle that res judicata may be pleaded not only to matters actually litigated

but also to those which could have been litigated was applied to the jurisdictional findings. This Court stated:

> "Whatever the contention as to jurisdiction may be, whether it is that the boundaries of a valid statute have been transgressed, or that the statute itself is invalid, the question of jurisdiction is still one for judicial determination. If the contention is one as to validity, the question is to be considered in the light of the standing of the party who seeks to raise the question and of its particular application." 308 U. S. 371, 377, 84 L. ed. 329, 334.

The Court, citing *Stoll v. Gottlieb*, supra, then concluded:

> "There can be no doubt that if the question of the constitutionality of the statute had actually been raised and decided by the District Court in the proceeding to effect a plan of debt readjustment in accordance with the statute, that determination would have been final save as it was open to direct review upon appeal." 308 U. S. 371, 377-78, 84 L. ed. 329, 334.

The principles announced in the above discussed cases were reaffirmed in *Jackson v. Irving Trust Co.*, 311 U. S. 494, 85 L. ed. 297, 61 S. Ct. 326 (1941). Briefly, the United States moved to set aside a prior decree under the Trading with the Enemy Act contending that the court had been without jurisdiction. Affirming the decision of the lower federal courts, Mr. Chief Justice Hughes, speaking for the Court, reiterated the previous holdings in *Stoll* and *Chicot*, and found the prior decree to be res judicata as to the jurisdictional question.

A few terse yet well-grounded and erudite conclusions can be drawn from the decisions of this court involving the res judicata effect of jurisdictional findings. The

Fourteenth Amendment to the United States Constitution does not guarantee the right to litigate the same question twice, be it jurisdictional or substantive. *Chicago Life Ins. Co. v. Cherry*, 244 U. S. 25, 61 L. ed. 966, 37 S. Ct. 492 (1917); *Baldwin v. Iowa State Traveling Men's Assn.*, supra. The principles of res judicata apply in all their force and effect to questions of subject matter jurisdiction which have actually been litigated by the parties upon a full hearing of all the facts and law. *Stoll v. Gottlieb*, supra; *Chicot County Drainage Dist. v. Baxter State Bank*, supra. This rule is not varied by the fact the determination of subject matter jurisdiction in the first instance was, in fact, erroneous. *Stoll v. Gottlieb*, supra.

Any question of validity of the Nebraska decision in *Durfee v. Keiffer*, 168 Neb. 272, 95 N. W. 2d 618 (1959), or any question of a Fourteenth Amendment violation as a result of this decision could have been raised in a direct proceeding to this Court to review the Nebraska determination. Such review was not attempted and the Nebraska decision is res judicata in any subsequent proceeding between the same parties raising the identical questions which were before the Nebraska Court.

Full Faith and Credit

At this juncture we consider the relationship between res judicata and the full faith and credit requirement. The full faith and credit mandate of Article IV, Section 1 of the United States Constitution has been in some degree expanded by Congressional implementing legislation. See 62 Stat. 947, 28 U. S. C. A. Section 1738 (1948). Controlled by this statute not only must a state court give full fatih and credit to the judgments of its sister

state, but further, this faith and credit requirement extends to federal courts. *Mills v. Duryee,* 11 U.S. (7 Cranch) 481, 3 L. ed. 411 (1813).

Both the underlying principle of the full faith and credit requirement of the Constitution and the express language of Congress require the judgment of a sister state to be given the same faith and credit which it would receive were it being reviewed in the state of its rendition. See *Christmas v. Russell,* 72 U.S. (5 Wall.) 290, 18 L. ed. 475 (1866); *Thompson v. Whitman,* 85 U.S. (18 Wall.) 457, 21 L. ed. 897 (1874). In either instance there is a clear and precise distinction between a judgment in which the jurisdiction is assumed or recited in the record, and that in which the jurisdictional questions are actually determined.

As the full faith and credit clause and the Congressional legislation passed in pursuance thereof prescribe the effect of a sister state judgment to be the same "by law or usage" as it would have been in the rendering state, a brief review of Nebraska law in this respect is in order. Our court has announced that a judgment of a court which did not have jurisdiction of the subject matter or the person, and that question was not litigated, is not res judicata. *Zenker v. Zenker,* 161 Neb. 200, 72 N. W. 2d 809 (1955). *Zenker* involved an attempt to register a Colorado divorce decree in Nebraska. Recognition was refused when it was shown that personal service over the defendant-husband had been obtained by fraud, that the plaintiff-wife had never been a Colorado domiciliary and that the judgment was by default.

Nonetheless, the Nebraska court has recognized that a determination of jurisdiction which has actually been litigated is not open to collateral attack. In *Gergen v. Western Union Life Ins. Co.*, 149 Neb. 203, 30 N. W. 2d 558 (1948), our court stated:

> "This court adheres to the rule that if a court is one competent to decide whether or not the facts in any given proceeding confer jurisdiction, decides that it has jurisdiction, then its judgments entered within the scope of the subject matter over which its authority extends in proceedings following the lawful allegation of circumstances requiring the exercise of its jurisdiction, are not subject to collateral attack but conclusive against all the world unless reversed on appeal or avoided for error or fraud in a direct proceeding." 30 N. W. 2d at 562.

It is thus apparent that had respondent herein commenced her second action in Nebraska, say, for example, in the Federal District Court, she would have been concluded from contesting either the jurisdiction or substantive holdings of the Nebraska Supreme Court.

There remains the full faith and credit problem raised by the opinion of the Court of Appeals. That court, relying on *Thompson v. Whitman*, supra, and similar cases denied full faith and credit to the Nebraska decision. Let us then examine *Thompson* and probe briefly other decisions of this Court involving the combination of res judicata, full faith and credit and jurisdictional determinations.

Thompson v. Whitman, supra, originated as a trespass action based upon an asserted unlawful seizure of the plaintiff's sloop. The defendant attempted to justify

the seizure on the ground the sloop was unlawfully gathering clams within the jurisdiction of Monmouth County, New Jersey. The plaintiff challenged the place of seizure as being within New Jersey waters, thereby challenging the authority of the defendant to make the seizure. Defendant pleaded as res judicata a New Jersey judgment which recited the offense as having been committed in Monmouth County.

On review, this Court decided that the full faith and credit clause did not prevent a subsequent inquiry into jurisdiction. This collateral attack, however, was allowed in a situation where the prior finding of jurisdiction was supported only by an allegation in the records of the initial proceeding. There had been no actual litigated determination of jurisdiction or finding as to where the sloop had been seized.

In *American Surety Co. v. Baldwin*, 287 U.S. 156, 77 L. ed. 231, 53 S. Ct. 98 (1932), the surety company sought to be relieved of two judgments by an Idaho Court on a supersedeas bond. By executing the bond the company became a party to the litigation under the laws of Idaho. There was a judgment entered on the bond pursuant to a consent to judgment contained therein. In the collateral proceeding the surety company contended that a proper construction of the bond indicated that as to one of the judgment debtors, it had not consented to judgment without notice, and thus the Idaho Court was without jurisdiction to enter such an order. This Court refused to uphold these allegations, pointing out that after entry of the consent judgment the surety company moved the Idaho District Court to vacate and set aside its order.

The ruling on this motion was appealed to the Supreme Court of Idaho where it was determined that the jurisdiction of the Idaho District Court had been decided in the original proceeding; that the surety company was a party to that proceeding; that no appeal was taken to the Idaho Supreme Court from that determination; and thus the surety company was precluded by res judicata from raising a jurisdictional question by its motion to vacate.

Mr. Justice Brandeis, after pointing out that the jurisdictional question was actually adjudicated and not merely assumed, concluded:

> "The principles of res judicata apply to question of jurisdiction as well as to other issues. Baldwin v. Iowa State Traveling Men's Assn., 283 U. S. 522, 75 L. ed. 1244, 51 S. Ct. 517. They are given effect even where the proceeding in the federal court is to enjoin the enforcement of a state judgment, if the issue was made and open to litigation in the original action, or was determined in an independent proceeding in the state courts. * * * Since the decision would formally constitute res judicata in the courts of the state; since it in fact satisfied the requirements of prior adjudication; and since the constitutional issue as to jurisdiction might have been presented to the state Supreme Court and reviewed here, the decision is a bar to the present suit insofar as it seeks to enjoin the enforcement of the judgment for want of jurisdiction: 287 U. S. at 166-67, 77 L. ed. at 238."

The criteria set forth by Mr. Justice Brandeis in Baldwin likewise appear herein. The following factors were considered determinative: (1) The decision of the Idaho state courts on the issue of jurisdiction constituted res judicata within that state; (2) the requirement of

prior adjudication was satisfied; and (3) any constitutional issue as to jurisdiction might have been carried through the state courts and presented for review in the United States Supreme Court. The identical criteria are presented in this case. Presumably the Nebraska decision in *Durfee v. Keiffer*, supra, is res judicata in Nebraska courts; the question of subject matter jurisdiction has actually been litigated by the parties; and finally, any constitutional issues as to jurisdiction could have been raised by the respondent upon review to this court.

A similar decision was reached in *Chicago Life Ins. Co. v. Cherry*, 244 U.S. 25, 61 L. ed. 966, 37 S. Ct. 492 (1917), involving an Illinois action upon a prior Tennessee judgment. The defendants claimed the Tennessee court had not obtained personal jurisdiction. The Illinois court refused to inquire into the jurisdiction of the Tennessee courts as this issue had been adjudicated after a full hearing in the first instance. Though the question of full faith and credit was not raised since the Illinois courts refused to inquire into jurisdiction, this Court recognized that there was no constitutional prohibitions preventing the recognition of an actually litigated jurisdictional question.

In *Williams v. North Carolina*, 325 U.S. 226, 89 L. ed. 1577, 65 S. Ct. 1092 (1945) this Court held that a state, having a sincere and recognized interest in her domicilaries, is not bound by a jurisdictional determination of domicile in a foreign court in an action to which the state itself was not a party. This decision is inapplicable here for Nebraska is contending neither that *Durfee v. Keiffer*, supra, binds her or Missouri on the question of

state boundaries, nor does she claim to have any inherent interest in controlling the ownership of the land in dispute. Nebraska's interest is in seeing that the final judgments of this State are accorded the faith and credit required by Article IV, Section 1 of the United States Constitution.

Applicable here is *Sherrer v. Sherrer*, 334 U.S. 343, 92 L. ed. 1429, 68 S. Ct. 1087 (1948), a divorce case which holds a jurisdictional fact determination of Florida to be conclusive on the parties in a subsequent Massachusetts suit.

CONCLUSION

The principles of res judicata apply with equal force and effect to jurisdictional questions, be they personal or subject matter, as they do to substantive issues previously resolved between the parties. Respondent litigated the question of jurisdiction in the trial court, and after an unfavorable decision voluntarily submitted her case to the Nebraska Supreme Court. Pursuant to Nebraska rules a trial de novo was conducted and again the respondent was unsuccessful. Rather than further prosecute her jurisdictional claim by seeking review in this Court, a second action was commenced in Missouri involving the same parties, the same subject matter and the same issues. Upon examination of the many cases decided by this Court and the principles enunciated therein, it is submitted that the United States District Court was entirely correct in its determination that the Nebraska decision was res judicata.

It is further submitted that this res judicata effect was denied the full faith and credit to which it was entitled in the Court of Appeals. This Court accords the same faith and credit to jurisdictional determinations as it does to questions on the merits. There are no impelling policy reasons necessitating a deviation from the constitutional principles of the full faith and credit clause.

The State of Nebraska as *amicus curiae* respectfully submits that the decision of the Court of Appeals is erroneous, and prays that this Court reinstate the decision of the United States District Court below by remanding this cause with instructions to affirm.

Respectfully submitted,

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PROOF OF SERVICE

I, Clarence A. H. Meyer, Attorney General of the State of Nebraska and a member of the Bar of the Supreme Court of the United States, hereby certify that on August 22, 1963, I served copies of the foregoing Amicus Curiae Brief of the State of Nebraska upon respondent by depositing the same in a United States mailbox with first class postage prepaid, addressed to Robert A. Brown, Tootle-Enright Bank Building, St. Joseph 2, Missouri, such being the post office address of said counsel of record for respondent.

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